IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-154

WILSON H. ELKINS, PRESIDENT,
UNIVERSITY OF MARYLAND,

Petitioner,

v.

JUAN CARLOS MORENO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER

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OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Fourth Circuit is unpublished, but its issuance is reported at 556 F.2d 573 (4th Cir. 1977); the text of this opinion appears in the Appendix to the Petition for a Writ of Certiorari (APC 54a).[1] The order denying rehearing en banc, entered May 23, 1977, is unreported and appears in the Appendix to the Petition for a Writ of Certiorari (APC 55a). The opinion and order of the United States District Court for the District

[1] References to the Appendix to the Petition for a Writ of Certiorari are cited as "APC," and references to the Appendix herein as "A."

of Maryland was filed on July 13, 1976, in *Moreno v. University of Maryland*, 420 F. Supp. 541 (D. Md. 1976) (APC 8a).

JURISDICTION

The jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on April 28, 1977. Within the time prescribed by Rule 40 of the Federal Rules of Appellate Procedure, Petitioner filed a petition for rehearing and suggestion for rehearing en banc. That petition was denied by the court of appeals on May 23, 1977. A Petition for a Writ of Certiorari was filed within the 90 day period provided by 28 U.S.C. § 2101 and Rule 22 of this Court, and was granted on October 11, 1977.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Constitution of the United States

Amendment XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 8, § 110(a)(15)(G)(i) and (iv)

The term "immigrant" means every alien except an alien who is within one of the following classes of non-immigrant aliens—

* * *

(G)(i) a designated principal resident representative of a foreign government recognized de jure by the United States, which foreign government is a member of an international organization entitled to enjoy privileges, exemptions, and immunities as an international organization under the International Organizations Immunities Act (59 Stat. 669), accredited resident members of the staff of such representatives, and members of his or their immediate family.

* * *

(iv) officers, or employees of such international organizations, and the members of their immediate families.

Title 8, § 1184(a)

(a) The admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including when he deems necessary the giving of a bond with sufficient surety in such sum and containing such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time or upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under section 248 [§ 1258 of this title], such alien will depart from the United States.

Title 8, § 1202(c)

(c) Every alien applying for a nonimmigrant visa and for alien registration shall make application therefor in such form and manner as shall be by regulations prescribed. In the application the alien shall state his full and true name, the date and place of birth, his nationality, the purpose and length of his intended stay in the United States; personal description (including height, complexion, color of hair and eyes, and marks of identification); his marital status; and such additional information necessary to the identification of the applicant and the enforcement of the immigration and nationality laws as may be by regulations prescribed.

Code of Federal Regulations

Title 8, § 214.1 Requirements for admission, extension, and maintenance of status.

(a) *General.* Every nonimmigrant alien applicant for admission or extension of stay in the United States shall establish that he is admissible to the United States or that a ground of inadmissibility has been waived under section 212(d)(3) of the Act; present a passport upon admission and only when requested in connection with an extension of stay, valid for the period set forth in section 212(a)(26) of the Act, except as otherwise provided in this chapter, and, upon admission, a valid visa, except when either or both documents have been waived; agree that he will abide by all the terms and conditions of his admission or extension, and that he will depart at the expiration of the period of his admission or extension or on abandonment of his authorized nonimmigrant status; and post a bond on Form I-352 in the sum of not less than $500 if required by the district director, special inquiry officer, or the Board of Immigration Appeals at the time of admission or extension, to insure the maintenance of the alien's nonimmigrant status and his departure from the United States. A nonimmigrant whose visa has been automatically revalidated pursuant to 22 CFR 41.125(f) shall, if otherwise admissible, be readmitted for a period not to exceed the unexpired period of his initial admission or extension of stay which had been authorized by the Service prior to his departure to foreign contiguous territory or adjacent islands, as endorsed by the Service on the Form I-94 issued in connection with the returning nonimmigrant's prior admission or stay and presented by him, or as endorsed by the issuing school official or program sponsor on Form I-20 or DSP-66 presented by a returning nonimmigrant as defined in paragraph (F) or (J) of section 101(a)(15) of the Act. A nonimmigrant other than one in the classes defined in section 101(a)(15)(A) (i) or (ii) or (G) (i), (ii), (iii), or (iv) of the Act (members of which

classes are not required to obtain extensions of stay if they continue to be so recognized by the Secretary of State as members of such classes); section 101(a)(15)(B) who is visiting the United States temporarily for pleasure and section 101(a)(15) (C), (D), or (K) of the Act (members of which classes are ineligible for extensions of stay); or section 101(a)(15) (F) or (J) of the Act, and whose period of admission has not expired, shall apply on Form I-539 and may be granted or denied, without appeal, an extension of his period of temporary admission by an officer in charge of a suboffice or a district director. A separate application must be executed and submitted for each alien seeking an extension of temporary stay; however, regardless of whether they accompanied the applicant to the United States, the spouse and minor, unmarried children of any applicant who have the same nonimmigrant classification may be included in his application and may be granted the same extension without fee. If failure to file a timely application is found to be excusable, an extension may be granted from the time of expiration of authorized stay. When because of reasons beyond his control, or special circumstances, an alien needs an additional period of less than 30 days beyond his authorized stay within which to effect his departure, he may be granted such time without filing an application for extension. Extensions to members of a family group shall be for the same period; if one member is eligible for only a six-month extension and another for a twelve-month extension, the shorter period shall govern. For procedures relating to cancellation or breaching of bonds, see Part 103 of this chapter.

(b) *Termination of status.* Within the period of initial admission or extension of stay, the nonimmigrant status of an alien shall be terminated by the revocation of a waiver previously authorized in his behalf under section 212(d) (3) or (4) of the Act; or by the introduction of a private bill to confer permanent resident status on such alien.

(c) *Employment.* A nonimmigrant in the United States in a class defined in section 101(a)(15)(B) of the Act as a temporary visitor for pleasure, or section 101(a)(15)(C) of the Act as an alien in transit through this country, may not engage in any employment. Any other nonimmigrant in the United States may not engage in any employment unless he has been accorded a nonimmigrant classification which authorizes employment or he has been granted permission to engage in employment in accordance with the provisions of this chapter. A nonimmigrant who is permitted to engage in employment may engage only in such employment as has been authorized. Any unauthorized employment by a nonimmigrant constitutes a failure to maintain status within the meaning of section 241(a)(9) of the Act.

*University of Maryland Determination of In-State Status for Admission, Tuition, and Charge-Differential Purposes**

An initial determination of in-state status for admission, tuition, and charge-differential purposes will be made by the University at the time a student's application for admission is under consideration. The determination made at that time, and any determination made thereafter, shall prevail in each semester until the determination is successfully challenged prior to the last day available for registration for the forthcoming semester. A determination regarding in-state status may be changed for any subsequent semester if circumstances, as later defined, warrant redetermination.

In those instances where an entering class size is established and where an application deadline is stated, in-state conditions for admissions must be satisfied as of the announced closing application date.

* Draft of August 31, 1973 as amended on September 7, 1973. Approved by the Board of Regents on September 21, 1973 to become effective with any term of the University beginning on or after January 1, 1974.

General Policy

1. It is the policy of the University of Maryland to grant in-state status for admission, tuition and charge-differential purposes to United States citizens, and to immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States, in the following cases:

   a. Where a student is financially dependent upon a parent, parents, or spouse domiciled in Maryland for at least six consecutive months prior to the last day available for registration for the forthcoming semester.

   b. Where a student is financially independent for at least the preceding twelve months, and provided the student has maintained his domicile in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester.

   c. Where a student is the spouse or a dependent child of a full-time employee of the University.

   d. Where a student who is a member of the Armed Forces of the United States is stationed on active duty in Maryland for at least six consecutive months immediately prior to the last day available for registration for the forthcoming semester, unless such student has been assigned for educational purposes to attend the University of Maryland.

   e. Where a student is a full-time employee of the University of Maryland.

2. It is the policy of the University of Maryland to attribute out-of-state status for admission, tuition, and charge-differential purposes in all other cases.

3. Each campus of the University will be responsible for making the in-state determination for the prospective or enrolled student.

4. In-state status is lost at any time a financially independent student establishes a domicile outside the State of Maryland. If the parent(s) or other persons through whom the student has attained in-state status establishes a domicile in another state, the student shall be assessed out-of-state tuition and charges six months after the out-of-state move occurs.

5. The terms of this policy will not be applied retroactively.

Definitions

1. A student is financially dependent if he receives half or more than half of his support from another person or persons, or appears as a dependent on the federal or state income tax return of any other person. Conversely, a student is financially independent if he declares himself so, if he receives less than half of his support from any other person or persons and if he does not appear as a dependent on the federal or state income tax return of any other person.

2. A parent includes a natural parent, an adoptive parent, a legally-appointed guardian, and a person who stands *in loco parentis* to the student.

3. A spouse is a partner in a legally contracted marriage.

4. A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time.

5. The masculine gender of personal pronouns includes the feminine gender.

Application

1. A student requesting redetermination to in-state status who asserts that he is *financially dependent* upon a parent(s) or spouse domiciled in Maryland, as previously defined, will be required to produce by affidavit, in addition to other proof, documentation of the student's earnings for the

year immediately preceding the last day of registration for the semester for which the determination is requested. Such documentation shall include relevant income tax returns, statements from employers, and/or federal and state withholding forms. An affidavit showing all expenses of the student for the same period must also be submitted.

2. A student requesting redetermination to in-state status who asserts that he is *financially independent* will be required to present by affidavit documentation cited in paragraph 1.

3. In determining domicile, the University shall take into consideration, but shall not be limited to, the following criteria as they pertain to the individual case:

a. Own or rent and occupy real property in Maryland as one's domicile on a year-around basis.

b. Maintain a substantially uninterrupted presence within Maryland for six consecutive months, including those months when the University is not in regular session.

c. Maintain within the State of Maryland all or substantially all personal possessions.

d. Pay Maryland income tax on all earned income including all taxable income earned outside the State.

e. Register all owned motor vehicles in Maryland.

f. Possess a valid Maryland driver's license, if licensed.

g. Register to vote in Maryland, if registered.

h. Give a Maryland home address on federal and state income tax forms.

N.B. The documentation offered in these instances may be required to be in affidavit form.

Appeals

A student who disagrees with his classification may request a personal interview with a campus

classification officer or his designee at which time the student will have an opportunity to present any and all evidence he may have bearing on his classification and to answer any questions which have been raised about his status. A student may further file a written appeal from the campus classification officer or his designee to the Intercampus Review Committee (IRC). If the decision of the IRC is adverse to him, a student may further file a written appeal to the Office of the President of the University. The decision of the President of the University or his designee shall be final.

Implementation

The implementation of this new policy to those eligible for redetermination will require an extended period of time. It is hoped that a decision in each case will be made within ninety (90) days of a request for redetermination. During this period of time, or any further period of time required by the University, fees and charges based on the previous determination must be paid. If the determination is changed, any excess fees and charges will be refunded.

NOTE: The deadline for meeting all requirements for an in-state status and for submitting all documents for reclassification is the last day of late registration for the semester the student wishes to be classified as an in-state student.

QUESTION PRESENTED

Whether the decisions below erred in applying Supreme Court precedents on irrebuttable presumptions, disregarded the principles articulated in *Weinberger v. Salfi*, 422 U.S. 749 (1975), and incorrectly concluded that the University of Maryland's policy of denying in-state status for tuition and fee purposes to nonimmigrants holding G-4 visas establishes an irrebuttable presumption violative of the due process clause of the fourteenth amendment to the United States Constitution?

STATEMENT OF THE CASE

Following the decision of this Court in *Vlandis v. Kline*, 412 U.S. 441 (1973), the Board of Regents of the University of Maryland adopted a new policy for the classification of students as "in-state" or "out-of-state" for purposes of determining admission, tuition rates, and charge differentials. Like most other public institutions of higher education, the University of Maryland bases its award of in-state status on domicile.

Because it views nonimmigrant aliens as being under a legal disability which precludes the intent to be domiciled in Maryland, the University awards in-state status only to "United States citizens and . . . immigrant aliens lawfully admitted for permanent residence in accordance with the laws of the United States." Even these individuals do not qualify automatically for the preferential, in-state tuition and charge differential rates.

The in-state policy describes eight non-exclusive indicia of domicile which are used to assist the University in determining a student's status.[2] (If the student himself is financially dependent on a parent, the University looks to the status of the parent rather than of the student in making the determination.) For students who are not United States citizens or permanent resident aliens (or are the dependent children of financially responsible parents holding similar nonimmigrant status), the University does not further examine other domiciliary factors because such individuals cannot have the requisite legal intent to establish Maryland domicile.[3] However, the University recog-

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[2] Among the domiciliary indicia set out in the University's in-state policy are: presence, possession of personal and real property, motor vehicle registration, driver's license, voting, and income tax payments.

[3] The in-state policy defines domicile as follows:

> A domicile is a person's permanent place of abode; namely, there must be demonstrated an intention to live

nizes that citizens and aliens who are lawfully admitted for permanent residence can establish domiciliary intent for in-state purposes.

Thus, permanent resident aliens can and do qualify for the preferential rates on the same bases as United States citizens. The in-state policy denies preferential rates to *both* citizens who are not Maryland domiciliaries *and* to nonimmigrants who, by definition, are not Maryland domiciliaries; it benefits citizens who are domiciled in Maryland, as well as aliens who are Maryland domiciliaries.

Even nonimmigrants are not permanently precluded by the University policy from qualifying for in-state status. A financially responsible parent who adjusts his status from nonimmigrant to that of permanent resident alien is no longer disabled from exhibiting the necessary domiciliary indicia. The same is true if a nonimmigrant student becomes financially independent and, like one of the Respondents (Juan Otero), adjusts his status to that of a permanent resident alien. Moreover, the University's three-step appellate process is available to such individuals both with respect to the effect of change in their immigration status and, subsequently, exhibition of domiciliary indicia.

On May 27, 1975, Respondents, undergraduate students at the University of Maryland, brought suit for declaratory and injunctive relief in the United States District Court for the District of Maryland against the University and its President, Dr. Wilson H. Elkins, alleging jurisdiction under 28 U.S.C. § 1343(3) and (4). These financially dependent students were nonimmigrant aliens who held G-4 visas,[4] as did their fathers,

permanently or indefinitely in Maryland. For purposes of this policy only one domicile may be maintained at a given time.

[4] A "G-4 alien" is one class of nonimmigrants; it consists of aliens who are "officers, or employees of . . . international

who were employed by certain international organizations based in Washington, D.C., *viz.*, the Inter-American Development Bank (IDB) and the International Bank for Reconstruction and Development (World Bank).[5] In particular, the students challenged as

organizations . . . and the members of their immediate families." 8 U.S.C. § 1101(a)(15)(G)(iv). A G-4 nonimmigrant is admitted to the United States "for such time and under such conditions as the Attorney General may by regulations prescribe." 8 U.S.C. § 1184(a).

Pursuant to the regulations for the admission of nonimmigrant aliens into the United States, a nonimmigrant such as the holder of a G-4 visa must agree "that he will abide by all the terms of and conditions of his admission or extension and that he will depart at the expiration of the period of his admission or extension or on abandonment of his authorized nonimmigrant status." 8 C.F.R. § 214.1. In addition, an alien applying for a nonimmigrant visa must state under oath on his application "the purpose and length of his intended stay in the United States." 8 U.S.C. § 1202(c).

Thus, entitlement to G-4 nonimmigrant status by a person and his family is derived from the circumstances of that alien's employment with an international organization, and such status with its attendant permission to remain in the United States terminates at any time that the employment with an international organization ceases.

Under federal law, employees of the IDB and the World Bank who hold G-4 visas are the beneficiaries of various privileges and immunities, including exemption from federal and state income tax levies. Articles of Agreement of the International Bank for Reconstruction and Development, 60 Stat. 1440, T.I.A.S. No. 502; Agreement Establishing the Inter-American Development Bank, 10 U.S.T. 3029, T.I.A.S. No. 4397; 22 U.S.C. § 288(d); 26 U.S.C. § 893(a).

[5] Respondents Moreno and Otero are natives of Western Hemisphere countries, Paraguay and Bolivia, respectively (APC 12a-13a); Hogg is a native of an Eastern Hemisphere country, the United Kingdom (APC 15a). The former are children of IDB employees and the latter of a World Bank employee (APC 12a-15a). Amounts spent by their parents for their support were $3,000, plus tuition paid to the University, for Moreno (1974), Ex. 1, Att. 1 to Plaintiffs' Complaint, p. 8 (R. 23) and $6,000 for Hogg (1974), Ex. 3, Att. 1 to Plaintiffs' Complaint, p. 4 (R. 95), specific amounts not being alleged in the case of Otero. Ex. 2, Att. 1 to Plaintiffs' Complaint, pp.5-

violative of the due process and equal protection clauses of the fourteenth amendment to the United States Constitution the University's policy of denying in-state

6(R. 61-62). Wages earned by the students range from $567 for Moreno (1974), Ex. 1, Att. 1 to Plaintiffs' Complaint, p. 9 (R. 24) to $2,479 for Otero (1973). Ex. 2, Att. 1 to Plaintiffs' Complaint, p. 17 (R. 73).

Their fathers hold lucrative and responsible positions with their respective employers. Manuel Moreno has been employed by the IDB since 1960 and is a "member of the professional staff" of the Bank. Ex. 1 Att. 1 to Plaintiffs' Complaint, p. 18 (R. 33). Rene Otero has also worked for the IDB since 1960 and is assigned to the Bank's legal department. Ex. 2 Att. 1 to Plaintiffs' Complaint, p. 9 (R. 65). In 1974, Mr. Moreno received a salary of $26,380 plus a $2,550 dependency allowance. Ex. 1 Att. 1 to Plaintiff's Complaint, p. 18) (R. 33). The IDB pays a dependency allowance to employees of $675 annually for a spouse whose own annual income is less than $10,000 and $400 annually per child (A. 25a-27a).

World Bank allowances to employees are even greater. Senate Report No. 94-1009, Foreign Assistance and Related Program Appropriation Bill, 1977 (94th Congress, 2d Session) at 104-05. In addition, the World Bank by way of a "tuition equalization subsidy" reimburses staff members for the difference between in-state and out-of-state tuition charged by the University of Maryland (A. 40a-42a)

None of the fathers pay income tax on compensation received from their respective international organization employers. Throughout the in-state determination appeals process and this litigation, the students were represented by counsel retained by their respective international organizations. (Brief of Appellees at 17, Moreno v. University of Maryland, 556 F.2d 573 (4th Cir. 1977)).

These compensation and fringe benefit policies of the IDB and World Bank have met with sharp criticism. As one congressional committee has noted

> [O]ur investigations have led us to the distressing conclusion that, rather than the rewards of a career of service, there is found in the banks a broad pattern of personal enrichment. The personnel management practices of the bank are suggestive of an institutionalized granting of lifetime sinecures where extraordinarily high salaries are commonplace and the pursuit of fringe benefits has been raised to a form of art.

Senate Report No. 94-1009, *supra* at 102.

status for tuition and charge differential purposes to holders of G-4 visas or those who are financially dependent on persons holding such nonimmigrant status.

After a hearing on April 9, 1976, the district court, on July 13, 1976, filed an opinion (APC 8a) holding that the University's in-state policy as applied to G-4 aliens created an impermissible irrebuttable presumption in violation of the due process clause of the fourteenth amendment. The court said that by the use of a presumption of nondomicile for G-4 aliens, the University denied Respondents the opportunity to demonstrate that they were entitled to in-state status for purposes of tuition and charge differentials.

Relying on *Vlandis v. Kline, supra, Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the court held that this irrebuttable presumption of nondomicile could not be justified on the basis of cost equalization or administrative convenience because it was not (according to the court) universally true and because the University had a reasonable alternative means of making a domicile determination for holders of G-4 visas (*viz.*, the application of the eight non-exclusive indicia of domicile). Ignored by the court was any discussion of or reference to *Weinberger v. Salfi*, 422 U.S. 749 (1975),[6] nor did the court attempt to apply the principles of *Salfi* or to distinguish the present case from *Vlandis*. Because the district court decided the case on due process grounds, it did not rule on the students' equal protection claim.

The court enjoined the University's President (the University itself was dismissed as a party) from denying Respondents and members of their class in-

[6] Neither party called the case to the attention of the district court.

state status "solely because they or their parents" hold G-4 visas[7] (APC 51a).

On July 31, 1976, an appeal was noted. Before the court of appeals, Petitioner contended that the principles of *Salfi* and subsequent "irrebuttable presumption" decisions of this Court warranted reversal. Nevertheless, in a per curiam opinion, dated April 28, 1977, the court of appeals affirmed the district court, eschewed any discussion of or reference to *Salfi* and its progeny, and in effect adopted the opinion of the district court (APC 54a). A timely petition for rehearing by the full court was filed, and denied on May 23, 1977 (APC 55a). On May 26, 1977, upon Petitioner's motion, the Fourth Circuit stayed its mandate pending application to this Court for a writ of certiorari (APC 56a).

A timely Petition for a Writ of Certiorari was filed with this Court on July 28, 1977, and granted on October 11, 1977.

SUMMARY OF ARGUMENT

Relying upon *Vlandis v. Kline*, 412 U.S. 441 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) and *Stanley v. Illinois*, 405 U.S. 645 (1972), the lower courts erroneously concluded that the University of Maryland's in-state policy for admission, tuition, and charge differentials creates an unconstitutional irrebuttable presumption of non-domicile for nonimmigrants.

EFFECT OF *SALFI*

Under *Weinberger v. Salfi*, 422 U.S. 749 (1975), state classifications not affecting fundamental liberties do not create unconstitutional irrebuttable presumptions or violate due process if rationally related to a legitimate governmental objective. Basic human liber-

[7] On August 3, 1976, in response to Petitioner's motion, the district court stayed those portions of its final order which granted declaratory and injunctive relief (APC 52a).

ties and fundamental constitutional rights are not at stake in this case. *Compare San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), *with Cleveland Board of Education v. LaFleur, supra*, and *Stanley v. Illinois, supra*.

INAPPLICABILITY OF *VLANDIS*

Vlandis v. Kline, supra, does not invalidate irrebuttable presumptions which are not "permanent" in nature. Here, if the parents of Respondents alter their immigration status to permanent resident alien or if the students similarly alter their status and become financially independent while students, they will be entitled to qualify for in-state status on the same bases as Maryland domiciliaries. *See Starns v. Malkerson*, 401 U.S. 985 (1971).

STATE INTERESTS

The challenged feature of the University's in-state policy bears a rational relationship to the University's purpose of limiting its expenditures, achieving cost equalization, efficiently administering the in-state determination and appeals process, and preventing disparate treatment among categories of nonimmigrants with respect to tuition and fee differentials. *Knebel v. Hein*, 429 U.S. 288 (1977); *Weinberger v. Salfi, supra; Mathews v. Diaz*, 426 U.S. 67 (1976); *Starns v. Malkerson, supra*. The policy does not create a classification on the basis of alienage, because it is predicated upon domicile and therefore disadvantages a class which includes some United States citizens as well as some aliens. *Compare Nyquist v. Mauclet*, ___ U.S. ___, 53 L. Ed. 2d 63 (1977).

TRUTH OF PRESUMPTION

Even if *Vlandis v. Kline, supra*, is held to apply to this case, the premise of the University's in-state policy, *viz.*, that nonimmigrant aliens cannot acquire Mary-

land domicile, is universally true. Federal law and the Maryland law of domicile preclude nonimmigrant aliens and G-4's in particular from establishing domicile in the United States. 8 U.S.C. § 1101(a)(15)(G)(iv), § 1184(a) & § 1202(c); 8 C.F.R. § 214.1; *Nyquist v. Mauclet, supra; Brafman v. Brafman,* 144 Md. 413, 125 A. 161 (1924).

VLANDIS SHOULD BE OVERRULED

Post-*Vlandis* decisions of this Court have so eroded the theory and application of that case as to warrant its overruling. *Weinberger v. Salfi, supra; Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1 (1976); *Murgia v. Massachusetts Board of Retirement,* 427 U.S. 307 (1976); *Knebel v. Hein, supra; Skafte v. Rorex,* 430 U.S. 961 (1977); *Fiallo v. Bell,* 430 U.S. 787 (1977).

ARGUMENT

I.

UNDER THE PRINCIPLES SET FORTH IN *WEINBERGER v. SALFI,* 422 U.S. 749 (1975), AND ITS PROGENY, THE UNIVERSITY'S IN-STATE POLICY DOES NOT ESTABLISH AN IRREBUTTABLE PRESUMPTION IN VIOLATION OF DUE PROCESS.

The principal issue in this case is whether the irrebuttable presumption doctrine of *Vlandis v. Kline,* 412 U.S. 441 (1973), which has been severely limited if not overruled by *Weinberger v. Salfi,* 422 U.S. 749 (1975), and subsequent decisions, must be applied to the classification at stake here.

The decisions below hold that every irrebuttable presumption not universally true in fact is unconstitutional (APC 41a). Applying this now discredited principle, *see Weinberger v. Salfi, supra* at 781 (1975); *The Supreme Court, 1974 Term,* 89 Harv. L. Rev. 47, 78 (1975), the district court opinion adopted by the court of appeals concluded that neither the Maryland law of domicile nor United States immigration law precluded a

G-4 alien from acquiring a state domicile. Hence, according to its reasoning, the University, although perhaps correct in its interpretation of the law of domicile with respect to other categories of nonimmigrants, had adopted a not universally true or invalid measure of domicile with respect to G-4's. In arriving at this conclusion, the opinion relied on three cases to support its view that the application of the University's in-state policy to G-4 aliens created an unconstitutional irrebuttable presumption, the first and foremost being *Vlandis v. Kline, supra.*

In *Vlandis,* a deeply split decision, this Court held that a "permanent" irrebuttable presumption of nonresidence was created by a Connecticut statute which provided that an out-of-state applicant for admission to a public college could not adjust to in-state status for the entire period of his attendance at the school, when that presumption was not universally true in fact. 412 U.S. at 443, 452. However, the majority opinion upheld the power of the State to charge nonresidents higher tuition and carefully distinguished two prior cases relating to in-state/out-of-state tuition differentials.

The first, *Starns v. Malkerson,* 326 F. Supp. 234 (D. Minn. 1970), *aff'd,* 401 U.S. 985 (1971), upheld Minnesota's requirement that no student is eligible for in-state status for tuition purposes unless he has been a bona fide domiciliary of the state for at least one year. The second case, *Kirk v. Board of Regents of University of California,* 78 Cal. Rptr. 260 (1969), *appeal dismissed,* 396 U.S. 554 (1970), upheld a similar one-year residency requirement for in-state status. The Court noted that under these schemes the student could rebut the presumption of nonresidency after having lived in the state one year by presenting other sufficient evidence to

show bona fide domicile within the state. 412 U.S. at 452. The Court added that:

> By contrast, the Connecticut statute prevents a student who applied to the University from out of State, or within a year of living out of State, from *ever* rebutting the presumption of nonresidence during the *entire time* that he remains a student, no matter how long he has been a bona fide resident of the State for other purposes.

Id. (emphasis added).

Finally, after rejecting two of Connecticut's proffered justifications for the statutory scheme (*viz.*, cost equalization, preference for established residents), the majority, in language usually associated with the standard of "strict scrutiny" in equal protection cases, *see Dunn v. Blumstein*, 405 U.S. 330 (1972), said that the State's interest in administrative efficiency and certainty could not save the conclusive presumption "where there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised." 412 U.S. at 451. The Court identified that reasonable alternative as a system permitting an out-of-state student the opportunity to offer evidence of indicia of domiciliary intent. *Id.* at 454.

The lower courts in the present case also relied on two other decisions of this Court to strike down the in-state policy of the University of Maryland, *viz.*, *Stanley v. Illinois*, 405 U.S. 645 (1972), and *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). In *Stanley*, this Court struck down an administrative presumption that an unwed father was unfit to have custody of his children, and in *LaFleur* it held that a Board of Education rule presuming maternal incapacity for a set period during pregnancy and after childbirth created an unconstitutionally impermissible irrebuttable presumption.

Just as many lower courts did up to 1975,[8] the lower courts in the instant case read these three cases to stand for the proposition that any legislative or administrative classification that could be stated in the form of a presumption was unconstitutional if the presumption was not universally or necessarily true. Under such a rule, the lower courts felt under no constraint to limit *Vlandis* to its facts, to recognize that the presumption at issue in this case was not "permanent" like the one condemned in *Vlandis*, or to distinguish *LaFleur* or *Stanley* as involving classifications affecting fundamental rights.

Even at its zenith the irrebuttable presumption doctrine was never able to command more than a fragile majority of this Court's justices and met with the near universal condemnation of commentators[9] who contended that the doctrine was merely an excuse to apply "strict scrutiny" equal protection analysis.

Finally, in 1975, in *Weinberger v. Salfi*, *supra*, this Court sharply and properly curtailed the application of the irrebuttable presumption doctrine. *Salfi* involved a challenge to a Social Security Act provision which limited eligibility for survivors' benefits to persons whose relationship with the insured began at least nine months before his death. The plaintiffs contended that the nine-month duration-of-relationship requirement created an impermissible irrebuttable presumption that short-lived marriages were a sham aimed at obtaining benefits and that the plaintiffs should be given an

[8] *See, e.g.*, Salfi v. Weinberger, 373 F. Supp. 961, 965 (N.D. Cal. 1974), *rev'd*, 422 U.S. 749 (1975); Hein v. Burns, 402 F. Supp. 398 (S.D. Iowa 1975), *rev'd*, 429 U.S. 288 (1977).

[9] Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1975).

opportunity to demonstrate the bona fide nature of their relationship with the insured. The trial court, like the lower court in the present case, felt it was unnecessary to demonstrate how *Vlandis, LaFleur,* and *Stanley* applied to the challenged statute. Instead, the district court in *Salfi* merely asserted that these decisions mandated the invalidation of every legislative presumption that was not universally or necessarily true in fact. *Salfi v. Weinberger, supra;* 89 Harv. L. Rev. at 78 n.16.

However, on appeal, this Court rejected such a superficial analysis. *Stanley* and *LaFleur* were distinguished on the grounds that they involved *basic* civil rights and due process liberties, such as the right to raise one's children and the right to personal choice in matters of marriage and family life. 422 U.S. 771.[10] Rather than relying on anything said in *Vlandis*, the Court based its decision on *Starns*:

> As in *Starns v. Malkerson*, . . . the benefits here are available upon compliance with an objective criterion, one which the Legislature considered to bear a sufficiently close nexus with underlying policy objectives to be used as the test for eligibility. Like the plaintiffs in *Starns*, appellees are completely free to present evidence that they meet the specified requirements; failing in this effort, their only constitutional claim is that the test they cannot meet is not so rationally related to a legitimate legislative objective that it can be used to deprive them of benefits available to those who do satisfy that test.

[10] In Turner v. Department of Employment Security, 423 U.S. 44, 181 (1975), a case decided after *Salfi*, this Court in a per curiam opinion struck down a Utah law creating a presumption of maternal incapacity "virtually identical to the presumption found unconstitutional" in *LaFleur*. However, the Court was careful to adopt the limitations on the irrebuttable presumption doctrine set out in *Salfi*. ("The Fourteenth Amendment requires that . . . [states] must achieve legitimate state ends through more individualized means *when basic human liberties are at stake.*") *Id.* at 46 (emphasis added).

Id. at 772 (citation omitted).

Absent in *Salfi* was any of the language of "strict scrutiny" or "least restrictive alternative"; instead, this Court emphasized the "minimum rationality" equal-protection standard applicable in social welfare cases. *See Dandridge v. Williams*, 397 U.S. 471 (1970); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Unlike *Vlandis*, *Salfi* demonstrated deference to a proffered administrative convenience justification for the statutory scheme:

> There is . . . no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

422 U.S. at 785.

Most significantly, the fact that the "presumption" at issue was not universally true did not aid the plaintiffs' case:

> [U]ndoubtedly [the statute] excludes some surviving wives who married with no anticipation of shortly becoming widows, and it may be that appellee Salfi is among them. . . .
>
> While it is possible to debate the wisdom of excluding legitimate claimants in order to discourage sham arrangements, we think it clear that Congress could rationally choose to adopt such a course.

Id. at 781.

Finally, sounding the death knell for any expansion of the irrebuttable presumption doctrine, this Court said:

> We think that the District Court's extension of the holdings of Stanley, Vlandis and LaFleur to

> the eligibility requirement in issue here would turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgments which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution.

Id. at 772.

And *Salfi* was just the beginning of what is now a long line of this Court's cases that refuse to apply *Vlandis* and its progeny or which reverse decisions that applied the doctrine in the fashion of the district court opinion adopted by the Fourth Circuit here.

In *Murgia v. Massachusetts Board of Retirement*, 427 U.S. 307 (1976), this Court reversed a three-judge district court decision that invalidated a statute providing for the mandatory retirement of State police officers at 50 years of age. The age classification had been challenged below on both due process and equal protection grounds and the lower court had relied on *LaFleur* to strike down the statute. Yet this Court eschewed any discussion of irrebuttable presumptions and upheld the statute applying traditional "rational basis" equal protection analysis.[11]

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court overturned the decision of a three-judge federal court that *Vlandis* and *Stanley* mandated the unconstitutionality of a statutory irrebuttable presumption of total disability for miners due to black lung disease based on clinical evidence of a complicated stage of the disease. In so doing, the Court relied on *Salfi* and noted that the mere fact that the statute was phrased in terms of an irrebuttable presumption would not invalidate the statute "when its operation and effect are completely permissible." *Id.* at 24.

[11] In Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), both the opinion of the court and the dissenting opinion noted that the *Murgia* decision cast a cloud on the continued vitality of the irrebuttable presumption doctrine.

In *Knebel v. Hein*, 429 U.S. 288, (1977), the Court overturned a three-judge court's determination that a federal food stamp regulation disallowing a deduction for transportation expenses in connection with job training for purposes of computing a recipient's income was unconstitutional as violative of the irrebuttable presumption doctrine. Although the Court noted that "the District Court was correct that the regulations operate somewhat unfairly in appellee's case," it stated that they did not embody an irrebuttable presumption. *Id.* at 297.

In *Skafte v. Rorex*, 553 P.2d 830 (Colo. 1976), *appeal dismissed for want of substantial federal question*, 430 U.S. 961 (1977), the Court summarily disposed of a resident's alien's contention that a state ban against voting by aliens created an irrebuttable presumption.

And in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court rejected an irrebuttable presumption challenge to a federal statute that denied preferential immigration status to unwed fathers and their illegitimate offspring despite the obvious fact that the challenged classification, like those at issue in *Stanley* and *LaFleur*, affected fundamental freedoms of choice in matters of marriage and family life.[12] This wealth of authority points to only one conclusion, that the lower courts in this case

[12] Other circuit courts of appeals were quick to perceive that the irrebuttable presumption doctrine was on the descendancy.

In Mogle v. Sevier County School Dist., 540 F.2d 478 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), the Tenth Circuit, in reliance upon *Salfi*, held that in a case challenging a residency requirement for teachers:

> [W]e do not feel the conclusive presumption doctrine was intended to apply. The Supreme Court has disapproved extention of the doctrine which would make it destructive of numerous legislative judgments drawing lines.

540 F.2d at 485.

In Sellers v. Ciccone, 530 F.2d 199 (8th Cir. 1976), the Eighth Circuit upheld the exclusion of long-term inmates

have fundamentally misapplied what little, if anything, that may be left of the irrebuttable presumption doctrine.[13]

Contrary to the holding of the lower courts, *LaFleur* and *Stanley* have no application here. Basic human liberties and fundamental constitutional rights are not at stake in this case. Public education is not a right secured by the United States Constitution. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973); *Starns v. Malkerson, supra; Kirk v. Board of Regents of the University of California, supra.* And state regulation of entitlement to limited education benefits falls in the category of the social welfare legislation reviewed in *Salfi.*[14]

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from prison training programs, primarily on the basis of *Salfi.* 530 F.2d at 202.

And in Fisher v. Secretary of HEW, 522 F.2d 493 (7th Cir. 1975), the Seventh Circuit upheld the validity of Social Security Act presumptions with respect to coverage of domestic servants, stating:

> As noted by Mr. Justice Rehnquist in his dissent in *LaFleur,* almost any law could be in some sense characterized as an irrebuttable presumption. In the normal case, well established standards of equal protection and due process should be applied to determine the validity of a Congressional enactment. It is only an unusual case where a statute will be declared invalid because of an improper irrebuttable presumption, and the same result would not be reached applying normal equal protection and due process standards.

Id. at 504.

[13] This Court may very well conclude that under *Salfi* and its progeny the irrebuttable presumption doctrine no longer has any force except, perhaps, where a classification affecting fundamental constitutional rights is involved. Petitioner respectfully submits, however, that the better course, for the guidance of the lower federal judiciary, would be to overrule the doctrine and to require traditional equal protection analysis of state classifications.

[14] Moreover, Respondents have not demonstrated "property" or "liberty" interests necessary to invoke the guarantee

The classification at issue in this case, even assuming it is regarded as a presumption, does not fall within the prohibitions of *Vlandis*. First, the presumption is not permanent.

Unlike the students in *Vlandis* who could never qualify for in-state status, Respondents in this case do have the opportunity to qualify. If their parents alter their status to that of a permanent resident alien *or* if the students similarly alter their status and become financially independent, Respondents will be able to qualify for in-state status on the same basis as all other persons who may be domiciled in Maryland.

Unlike *Vlandis*, this case does not involve what was viewed as "a bizarre pattern of discrimination." *Vlandis v. Kline, supra* at 459 (White, J., concurring). The line drawn by the University of Maryland is one this Court has sustained. *Mathews v. Diaz,* 426 U.S. 67 (1976). *See Nyquist v. Mauclet,* ___ U.S. ___, 53 L. Ed. 2d 63 (1977). Like the plaintiffs in *Starns,* who after one year of disability could present evidence of domiciliary intent, the students in this case, after they or their parents alter their immigration status to that of permanent resident alien, can present evidence of domiciliary intent necessary to qualify for in-state status.[15]

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of due process. Property interests are created and their dimensions defined by reference to state law. Bishop v. Wood, 426 U.S. 341 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). The University's in-state policy, promulgated pursuant to the institution's broad statutory powers, *see* MD. ANN. CODE art. 77A, § 15 (1975), expressly does not provide nonimmigrants with the tuition subsidy accorded Maryland domiciliaries. In addition, as this Court observed in Memorial Hospital v. Maricopa County, 415 U.S. 250, 260 n.15 (1974), charging higher tuition fees to nonresident students cannot be equated with the denial of basic subsistence often held to call into play a "liberty" interest. *See also* Starns v. Malkerson, *supra;* Kirk v. Board of Regents, *supra.*

[15] It is not an unreasonable burden to require students or their parents to adjust their immigrant status before the

Nor can it be said that the University's in-state policy speaks in terms of domicile but signifies otherwise in the case on nonimmigrants — no more than Minnesota's policy in *Starns* of establishing a one-year restriction on demonstrating domicile can be said to be an unconstitutional "invalid measure of domicile" because a respectable body of law holds that physical presence for a moment in a particular place may be enough to establish domicile. *See White v. Tennant,* 31 W. Va. 790, 8 S.E. 596 (1888); *Winans v. Winans,* 205 Mass. 388, 91 N.E. 394 (1910); M. Jacobs, *Law of Domicile* § 134 (1887). However, even if Respondents in this case may in fact be Maryland domiciliaries, like the out-of-state students in *Starns* who may have been domiciliaries before the lapse of one year or the widow in *Salfi* who may have entered into a bona fide marriage without regard to obtaining Social Security benefits, it is clear that *Salfi* does not require that the allegedly presumed fact be true in every case.What *Salfi* does require is that the state classification be rationally related to a legitimate objective. 422 U.S. at 772.

University will further consider proffered evidence of domiciliary intent. First, whatever burdens may exist in this regard are created by the immigration laws and not the University. Cf. Fiallo v. Levy, 406 F. Supp. 162 (E.D.N.Y. 1975), *aff'd,* 430 U.S. 787 (1977). Second, as Respondents freely conceded below, 4th Cir. Brief of Appellees at 41, a G-4 in order to stay in this country will have to adjust his status to permanent resident alien. And in fact Respondent Otero and a daughter of Vincent Hogg (father of Respondent Hogg) have so adjusted their status. Moreover, both Eastern Hemisphere aliens like the Hoggs and Western Hemisphere aliens like the Morenos and the Oteros can adjust their status without leaving the country, 8 U.S.C. § 1255, and President Carter has recently ordered a speedup in the processing of applications for permanent residency. Undocumented Aliens — Fact Sheet, Office of the White House Press Secretary, 13 WEEKLY COMP. OF PRES. DOC. 1169 (Aug. 8, 1977). In addition, if as Respondents contended below, most G-4 parents who eventually become permanent residents do so as parents of children who become citizens or permanent residents, such parents need not obtain the labor certification sometimes required by 8 U.S.C. § 1182.

The interests asserted by Petitioner in support of the challenged in-state policy are entirely sufficient in light of the mere rational basis required by *Salfi.*

In *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 605-06 (1976), this Court noted:

> We do not suggest . . . that a State, Territory, or local government, or certainly the Federal Government, may not be permitted some discretion in determining the circumstances under which it will employ aliens or whether aliens may receive public benefits or partake of public resources on the same basis as citizens.

The line drawn by the University between permanent resident aliens and nonimmigrants is identical to that sustained by this Court in *Mathews v. Diaz, supra.* In *Diaz,* the Court upheld a scheme which *denied* Medicare benefits to nonimmigramts, but offered them to citizens and permanent resident aliens (the very same classification as in the instant case) on the rational basis that the amount of Medicare benefits was not limitless and that Congress could draw the line at citizens and permanent resident aliens because as a class they could be expected to have a greater affinity to the United States. Lest this case be distinguished as one involving the federal government's plenary control over aliens, the Court in *Diaz* noted that the only reason state exclusion of some aliens from benefits could not be justified is because the states invariably treated out-of-staters and aliens differently. Such a defect is not present in the University's in-state policy. Both out-of-staters and nonimmigrants are denied in-state status.

For these same reasons, *Nyquist v. Mauclet, supra,* is inapplicable. There, a five-Justice majority of this Court applied a strict scrutiny equal protection analysis to strike down a state educational benefits scheme which *denied* assistance to permanent resident aliens. In so

doing, the majority of the Court noted that the statute was "directed at aliens and . . . only aliens are harmed by it." 53 L. Ed. 2d at 70. On the contrary, the University's in-state policy *benefits* the precise class disadvantaged in *Mauclet* and is directed at and disadvantages only nondomiciliaries, a class which includes some United States citizens as well as some aliens.

Moreover, as *Mauclet* suggests at the very least, *id.* at 68, and as Respondents conceded below, 4th Cir. Brief of Appellees at 52, the classification created by the University is correct in its premise that most nonimmigrants are precluded from establishing domicile.[16] As one perceptive legal scholar has noted, because nonimmigrants cannot acquire domicile like permanent resident aliens, a state should have greater latitude in affecting the rights of the former group:

> Resident aliens are on a citizenship track — after five years they are eligible for naturalization. Their right to remain in the United States does not depend, however, on their obtaining citizenship. They serve in the armed forces and were subject to conscription under the selective service laws. They pay taxes precisely like citizens of the United States. They enjoy no immunity from state or federal criminal law. Resident aliens enter the United States with the intention of making this country their home, and it appears that the great majority of them remain here indefinitely. Nonresident aliens, by contrast, are admitted to the United States for strictly limited periods of time that are determined before they enter the United States. Included in the category of nonresident aliens are officials of foreign governments, temporary visitors for business or pleasure, foreign students, temporary workers and trainees, foreign journalists, and

[16] As Petitioner urges below in Part II of this Argument, this premise is universally true for all classes of nonimmigrants.

> many others who are neither expected nor permitted to remain in this country indefinitely.

G. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 Mich. L. Rev. 1092, 1110-11 (1977)[17]

The limitation of governmental expenditures to those with a greater affinity, a theory which supported the classifications at issue in *Diaz, Starns,* and *Kirk,* was the primary rationale proffered by the University in support of its in-state policy. In *Diaz,* this Court noted the reasonableness of the presumption said to be at issue here, the difficulty of line-drawing for purposes of entitlement to government benefits, and the obvious fact that "some persons who have an almost equally strong claim to favored treatment" are placed on different sides of the line. 426 U.S. at 83. Citing *Salfi* and *Dandridge v. Williams, supra,* this Court said, "When this kind of policy choice must be made, we are especially reluctant to question the exercise of Congressional judgment." 426 U.S. at 84. It is this kind of rational judgment which the lower courts struck down in the present case.

The University's requirement that nonresidents and nonimmigrants pay out-of-state rates bears a rational relationship to the State's purpose of financing, operating, and maintaining the University of Maryland. In addition, the University's in-state policy is a rational attempt to achieve cost equalization between those who have and those who have not recently contributed to the State's economy through employment, tax payments, and expenditures, *viz.,* nonimmigrants and other nonresidents. *See Starns v. Marker-*

[17] Professor Rosberg has noted that the number of nonimmigrants admitted for temporary periods each year exceeds 3 million while only 400,000 permanent resident aliens are admitted annually. G. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 MICH. L. REV. 1092, 1110 (1977).

son, supra. This economic argument takes on greater force in light of the fact that Respondents seek to carve out an exception in Maryland's even-handed administration of its in-state policy for a privileged class not subject to the full range of Maryland taxes.

Another sufficient interest recognized in *Salfi,* which justifies Maryland's treatment of nonimmigrant aliens, is the administrative difficulties presented by individualized hearings for the University's large nonimmigrant student population. At the College Park undergraduate campus of the University of Maryland, 14 staff members devote on the average a third of their time administering the in-state determination and appeal process at a cost of more than $60,000 annually. In 1975 alone, 875 petitions for in-state classification were filed. How much larger that figure would have been if individualized hearings on additional *domiciliary indicia* were given to nonimmigrants is a matter of speculation.[18] But the University's policy of limiting in-state classification hearings for nonimmigrants to the "objective criterion" of *changes in their immigration status* reduces the need for and burden and expense of long, complicated hearings (many of which may require interpreters) with respect to other *domiciliary indicia. Weinberger v. Salfi, supra* at 772. The University's policy promotes efficiency and reduces costs, so that funds might be better spent on educational needs, by requiring full-blown hearings on domiciliary indicia only when a G-4 alien or other nonimmigrant student has adjusted his immigration status.

Finally, Respondents' constitutional claims are in essence a demand for preferential treatment. In arguing below that federal law does not preclude G-4 visa holders from establishing domicile, they contend that unlike those immigrants specifically required to main-

[18] As of the fall of 1975, more than 550 nonimmigrants were registered at the University of Maryland.

tain an overseas domicile and those whom they say may enter the United States "for only a specific temporary purpose," G-4's and a few other immigrant categories are specially exempted by Congress from such a burden. 4th Cir. Brief of Appellees at 51-52. Thus, they in effect ask the University to administer its in-state policy by adopting such proffered distinctions, so as to favor a limited (and generally alluent see *supra* at 13-14 n.5) category of nonimmigrants and to deny benefits to other categories of nonimmigrants with generally more meager resources. The prevention of such disparate treatment is an additional reason for upholding the University's in-state policy. *See Knebel v. Hein, supra.*

In summary, Petitioner contends that the decisions below improperly permitted the irrebuttable presumption doctrine to become an "engine of destruction" for a rationally based classification, *Weinberger v. Salfi, supra* at 772, that the lower courts should never have required the challenged feature of the University's in-state policy to be "universally true in fact," and that its in-state policy comports with the requirements of due process if they have any application to this case.

II.

EVEN IF *VLANDIS* IS APPLICABLE AND IS HELD TO REQUIRE AN IRREBUTTABLE PRESUMPTION BE UNIVERSALLY TRUE, THE PRESUMPTION OF NONDOMICILE FOR NONIMMIGRANTS IS TRUE IN ALL CASES.

Petitioner has argued that the University is not constitutionally required to have an in-state policy universally true in its premise that nonimmigrants are disabled from establishing Maryland domicile as long as that presumption is rationally based. The University also contends that even in the event its policy is found under *Vlandis* to create a *permanent* irrebuttable presumption with respect to the domicile of holders of

G-4 visas, the student Respondents (or their financially responsible parents) lack the capacity to become Maryland domiciliaries and thus whatever presumption may exist is in fact universally true.

The University's in-state policy tracks the State's law of domicile to classify nonimmigrant aliens as nondomiciliaries. Under Maryland law domicile is defined as the "place where a man has his true, fixed, permanent home," *Shenton v. Abbott,* 178 Md. 526, 15 A.2d 906, 908 (1940), and as "residence at a particular place accompanied by positive or presumptive proof of the intention to remain there for an unlimited time." *Brafman v. Brafman,* 144 Md. 413, 414, 125 A. 161 (1924).[19] This definition by its terms would seem to preclude those who are not permanent resident aliens from acquiring domicile. Finally, it should be noted that in the context of entitlement to state benefits, the Maryland Court of Appeals has been very strict in the application of its law of domicile. *See, e.g., Walsh, Adm'r v. Crouse,* 232 Md. 386, 194 A.2d 107 (1963); *Maddy v. Jones,* 230 Md. 172, 126 A.2d 482 (1962).

Nonimmigrant aliens, and G-4 visa holders in particular, cannot establish the requisite intent necessary to create a Maryland domicile for in-state tuition purposes because of the terms and conditions upon which they continue to reside in this country. A G-4 visa is granted for the sole purpose of entry and residence during employment. An alien applying for a nonimmigrant visa must state under oath the "length of his intended stay in the United States." 8 U.S.C. § 1202(c). Thus, unless he adjusts his status to that of permanent resident alien, a G-4 can remain in this country only for a period of finite and limited duration.

[19] In addition, under Maryland law an individual must have the legal capacity to change his domicile. Liberty Mut. Ins. Co. v. Craddock, 26 Md. App. 296, 303, 338 A.2d 363 (1975).

The alien must leave upon termination of employment. 8 CFR § 214.1. And he represents an intent to do so when applying for the visa. The acquisition of Maryland domicile requires an intent to establish a home within the State without any present intention of removing therefrom. Thus, it would appear impossible as a matter of law for a person who has implicitly and continuously maintained that he intends to leave this country upon termination of employment (or other specific event such as in the case of foreign students on F-1 visas, the completion of their studies) to establish a Maryland domicile. Furthermore, absent an attempt to change from nonimmigrant to immigrant status, such a party should be estopped from asserting that despite his original pretentions, and despite the terms of his visa, he really intends to permanently reside in this country.

Rather than relying on any principle of the Maryland law of domicile, the lower court fashioned Maryland's law from a District of Columbia case declaring a G-4 to be a domiciliary for the purpose of access to the courts. *Alves v. Alves,* 362 A.2d 111 (D.C. 1970).[20] A fundamental error in the lower courts' analysis is its notion of domicile as a fixed, unalterable concept. However, domicile does not bear a fixed meaning and composition for all applications, and a determination that a nonimmigrant alien is domiciled in a place for one purpose does not necessitate that he is domiciled there for another. For example, Connecticut permits a nonresident alien to sue in its courts. *Santangelo v. Santangelo,* 137 Conn. 404, 78 A.2d 245, 247 (1951) ("An alien stands on the same footing as a non-resident. Our public policy, as reflected in our constitution, is that our

[20] Petitioner urged both the district court and the court of appeals to defer to Maryland courts the question of whether the state law precluded G-4's from establishing Maryland domicile, but the lower courts refused to abstain or certify the question to the Court of Appeals of Maryland. *See, e.g.,* Answer to Complaint (R. 116 *et seq.).*

courts should be open to 'every person.'")[21] Yet the University of Connecticut like practically every other state university requires a nonimmigrant alien student to become a permanent resident alien before he can qualify for in-state status.

Another illustration is *Hayes v. Board of Regents of Kentucky State University*, 362 F. Supp. 1173 (E.D. Ky. 1973), where a student, previously judged to be a Kentucky domiciliary by voting authorities, challenged a determination by the university that he was a nondomiciliary for tuitional purposes. The plaintiff contended that a decision by the former was binding upon the latter. There the court noted:

> This proposition is tenable only if 'domicile' bears a fixed meaning and composition for all applications. If the scope of this term varies according to the purpose served, Kentucky State University is obviously not bound by the identification of 'domicile' made by other agencies.

362 F. Supp. at 1173.

The court found that:

> [D]omicile is not susceptible to a rigid and arbitrary definition. The term will display varying hues as its application shifts. Consequently, there is no reason to presume that a determination of domicile by voting authorities has binding effect upon college officials.

Id. at 1175. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 11, Comment o (1971); Note, *Does Domicile Bear a Single Meaning?*, 55 Colum. L. Rev. 589 (1955).

The truth of the premise underlying the University's in-state policy is supported by Internal Revenue Service

[21] Santangelo v. Santangelo, 137 Conn. 404, 78 A.2d 245 (1951), also indicates that such access to the courts by aliens is predicated on comity rather than domicile.

Revenue Ruling 74-364, 1974-2 C.B. 321. There, the Internal Revenue Service held that the *nondomiciliary* rate should be applied to the estates of G-4 aliens, reasoning that:

> The acceptance by the decedent of the prescribed terms for his admission to and stay in the United States, as required by Federal law and regulations relating to immigration and nationality, created a legal disability that rendered him incapable of forming the intention necessary for the establishment of a domicile here, as required by section 20.0-1 of the Estate Tax Regulations. This legal disability continued to exist until the time of decedent's death since he was still in the United States as an employee of an international organization holding a G-4 visa.[22]

Petitioner also relied below on *Seren v. Douglas*, 30 Colo. App. 110, 489 P.2d 601 (1971), which held that a student (F-1) visa holder was precluded by federal law (8 U.S.C. § 1101(a)(15)(F)(i) and § 1184(a)) from establishing state domicile in order to qualify for in-state tuition rates. In a highly selective reading of *Seren*, and a fundamental misreading of the immigration laws, the lower courts herein concluded that only those nonimmigrants expressly required by law not to abandon their residence in a foreign country (such as student visa holders) were prevented from acquiring a new domicile. On the contrary, the framers of 8 U.S.C. § 1101 found no need to spell out the requirements of nonabandonment of homeland for nonimmigrants who were obviously destined for a temporary stay in the United States

[22] Respondents have suggested that the force of Rev. Rul. 74-364 is weakened by a recent Tax Court decision, Escobar v. Commissioner, 68 T.C. 304 (1977), which held that a G-4 visa holder was a *resident* alien for income tax purposes. Rather than turning on an application of the law of *domicile* as did Rev. Rule 74-364, *Escobar* was decided on the basis of income tax regulations which specifically enabled nonimmigrants to show *residency* for income tax purposes in cases of "exceptional circumstances." Treas. Reg. § 1.871-2(b).

keyed to their employment. Under the lower courts' superficial analysis of 1101(a)(15), diplomats (A), foreign press (I), alien crewmen (D), and even aliens in transit (C), are not prevented from obtaining a domicile in the United States.

As Professor Rossberg has observed, such persons "are neither expected nor permitted to remain in this country indefinitely." 75 Mich. L. Rev. at 1111. Finally, this Court itself has lent credence to the truth of the presumption said to be at issue in this case. In *Nyquist v. Mauclet, supra,* the majority opinion noted:

> Since many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country, see, e.g., 8 U.S.C. § 1101(a)(15)(F)(i); 22 C.F.R. § 41.45 (1976), the bar . . . [presented by the New York statute] is of practical significance only to resident aliens.

53 L. Ed. 2d at 68.

In summary, Petitioner urges that whether gauged by the Maryland law of domicile or the immigration law, the University's decision to deny nonimmigrants domicile and thus in-state status is universally true in fact. Hence it cannot violate due process.

III.

RECENT DECISIONS OF THIS COURT HAVE SO ERODED *VLANDIS v. KLINE*, 412 U.S. 441 (1973), THAT THIS COURT SHOULD NOW DECLARE IT OVERRULED.

As the review of post-*Salfi* cases in Part I of this Argument has indicated, as members of this Court have noted, *Weinberger v. Salfi, supra* at 802-03, as legal commentators have chronicled, *see, e.g.,* J. Chase, *The Premature Demise of Irrebuttable Presumptions,* 47 U. Colo. L. Rev. 653 (1976), and as perceptive lower courts have mused, *see e.g., Miller v. Carter,* 547 F.2d 1314 (7th Cir. 1977), the continued vitality of *Vlandis v. Kline, supra,* is in grave doubt. A doctrine which demands perfection in legislative line-drawing even when constitutionally protected interests are not at stake, offends reasoned constitutional theory as well as the very nature of law-making. Petitioner joins the amici curiae in urging this Court to declare *Vlandis* overruled.

CONCLUSION

In summary, Petitioner urges this Court to lay to rest a fundamental misapplication of the irrebuttable presumption doctrine, and that doctrine too. The lower courts incorrectly read that doctrine to mean that even if the University was generally and nearly universally correct in its legal interpretation of federal law and the law of domicile, it was constitutionally wrong. For these reasons, Petitioner contends that the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed and *Vlandis v. Kline, supra,* should be overruled.

Respectfully submitted,

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